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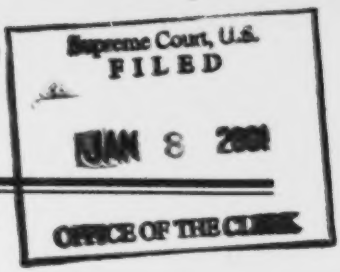

No. 99-1977

IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE GRAND LODGE OF THE FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Grand Lodge of the Fraternal Order of Police ("FOP"), with the consent of the parties, files this *amicus curiae* brief supporting reversal of the opinion by the Ninth Circuit in *Katz v. Saucier*, 194 F.3d 962 (9th Cir. 1999).[1] The FOP is interested in this case because the opinion below sets a dangerous precedent regarding a police officer's qualified immunity in a Fourth Amendment, excessive force case.

Police officers routinely are authorized and trained in the use of reasonable force in making lawful arrests. The opinion below exposes officers to litigation and potential liability for using even minimal force to take decisive control of an arrest situation, even when the force used is reasonably related to legitimate police purposes and its use causes no physical injury to the arrestee. The opinion below subjects officers to unreasonable second-guessing by courts and juries because it fails to afford the police a zone of protection in making the difficult, on-the-spot decisions required in their discharge of their official duties. Such second-guessing interferes with police effectiveness and will inevitably expose officers and the public to increased danger in a variety of situations.

These issues are of vital interest to the FOP and its membership. The FOP represents and promotes the interests of law enforcement officers throughout the United States. Membership in local FOP Lodges affiliated with the Grand

1. Counsel for the FOP are the sole authors of this brief and no person or entity other than the FOP made any financial contribution to the preparation and submission of this brief. The consents of the parties are being lodged herewith.

Lodge is limited to full-time law enforcement officers who support and defend the Constitution of the United States. The efforts of the FOP to promote the interests of its members have included, over the years, collective bargaining, provision of representation in contested legal matters, and advocacy of the interests of its membership before Congress and in the federal courts. In the past five years, the Grand Lodge and its licensed Lodges have negotiated with government employers on behalf of over 250,000 law enforcement officers. The Grand Lodge has participated as amicus in a number of federal cases, including cases before the Supreme Court. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

STATEMENT OF THE CASE

The Ninth Circuit held in *Katz v. Saucier*, 194 F.3d 962 (9th Cir. 1999), that petitioner, a military police officer, was not entitled to qualified immunity against a *Bivins* damage claim of excessive force in effecting the arrest of respondent, an animal rights activist. (*See* Appendix A to Petition, at 16a.) The trial court had ruled the decision to arrest respondent for defying a ban against protesting on the Presidio Army base was supported by probable cause. (Appendix B, at 23a.) The claim at issue was whether the force used to make an otherwise lawful arrest was excessive. It appears beyond serious dispute that petitioner used minimal force in making the arrest and that respondent suffered no injury.

Respondent entered the base planning to protest at a public speech by Vice President Gore. Petitioner had received instructions to keep an eye on respondent. Petitioner also was instructed that "demonstrations would not be allowed," and to "diffuse the situation if it arises," but not to "draw

that much attention if we didn't have to." (Appendix A at 3a.) During the speech, respondent left his seat, walked to a railing separating the audience from the speaker's, pulled a banner from underneath his jacket, and attempted to unfurl the banner. Respondent claims petitioner and another officer grabbed him from behind, and the banner was torn from his hands.

At that point, respondent stated in his deposition, the officers "sort of started sort of pick[ed] me up and kind of walk[ed] me out, kind of like very hurriedly, sort of like the bum's rush: Let's just get this guy out of here." Respondent was taken about fifty yards to a van. Respondent testified he was "shoved" into the van and stated:

> I was — my head was going to smash down, or I was going to go full length into — with my head going into the end of the van, and I was able to stop the downward and the forward motion by just catching myself so that I didn't smash myself.

(Appendix B at 24a-25a.)

There is conflicting evidence regarding whether respondent resisted arrest. However, it appears undisputed that respondent, who was sixty-years old at the time, managed to avoid any injury during his arrest, even though he already had a broken foot in a brace.

SUMMARY OF THE ARGUMENT

In *Anderson v. Crieghton*, 483 U.S. 635, 644 (1987), this Court held that the issue of whether a police officer has committed an objectively reasonable mistake for qualified

immunity purposes is not identical to the substantive issue of lawfulness *vel non* under the Fourth Amendment, despite the fact that the Fourth Amendment is couched in terms of a series of prohibitions against "unreasonable" government conduct.

Two years later, in *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that the test for excessive force in a Fourth Amendment case is whether the decision to use force to effect an arrest or seizure was objectively "reasonable." This question, the Court held, must be answered from the perspective of the police officer faced with the recurring, immediate, and often critical decisions of whether to use force, when to use force, and how much force to use. The Court specifically did not address how the "objectively reasonable" standard articulated with its qualified immunity analysis in *Anderson*. 490 U.S. at 399, n.12.

In the present case, the Court granted certiorari to resolve a split of authority among the lower courts on that very issue: Does *Graham*, in contrast to other areas of Fourth Amendment law, already fully incorporate the objective good faith concepts central to a qualified immunity analysis into its substantive analysis of lawfulness so that the two issues are really the same? Or is it still meaningful to speak of a police officer as having made a "reasonable mistake" about the amount of force that was legally permitted in a particular situation? *See* Petition at I (question 1 presented).

Amicus supports the arguments made by petitioner with respect to this issue. However, *amicus* also respectfully submits that whichever way the Court ultimately resolves this issue the Ninth Circuit got the qualified immunity question wrong. *See id.* (question 2). Were it accepted for

the sake of argument that the same concepts animate both an excessive force analysis and a qualified immunity analysis, this would imply that a broad range of conduct would be found reasonable under the Fourth Amendment, not that a narrow range of conduct would give rise to qualified immunity.

The Ninth Circuit's opinion is wrong because makes a very narrow range of conduct legally safe for an officer in conducting an arrest. Police officers are authorized to use reasonable force to make a lawful arrest. However, the opinion below precludes an officer from acting decisively to take control of an arrest situation with even minimal force, even when the arrest was otherwise lawful, the force used was reasonably related to legitimate police purposes, and there was no injury to the arrestee.

This ruling subjects law enforcement officers to all the dangers of post-hoc second-guessing against which this Court's cases warn. The court's opinion fails to give any deference to the practical exigencies that faced petitioner when he participated in respondent's arrest, and fails to consider key facts that supported the acts undertaken by petitioner.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN SUBSTITUTING ITS OPINION OF WHAT STEPS WERE NECESSARY TO SAFELY AND EFFECTIVELY ARREST RESPONDENT FOR AN ANALYSIS OF OBJECTIVE GOOD FAITH.

Petitioner was instructed to diffuse any confrontations with protesters as quickly as possible. This goal is consistent with legitimate concerns over maintaining public order. Consistent with his instructions, petitioner summarily escorted respondent to a police van where he was "shoved inside." Petitioner contends there were two alleged instances of force. The first, directly involving petitioner, consisted of "sort of picking [respondent] up and sort of walking [respondent] out," and the second, not directly involving petitioner, consisted of "shoving" respondent in the van. *See* Petition at 27-28. Respondent is an elderly gentleman and had a pre-existing broken foot at the time of his arrest. Nonetheless, he was not injured during the arrest. Judged against the substantial protection afforded police officers about the force necessary to make an arrest, and given the circumstances of this case, neither instance of force (even if both involved petitioner) was so clearly excessive that it defeats qualified immunity.

The Ninth Circuit used the wrong legal standard in analyzing the qualified immunity issue. It held petitioner was entitled to summary judgment if the evidence "compelled" the conclusion that the force used was reasonable. 194 F.3d at 970, n.5. Under this Court's cases, respondent only could defeat summary judgment if the evidence (viewed in the light most favorable to his claims) legally compelled the

conclusion that the force used was ***unreasonable***. Here, viewing the evidence in the light most favorable to respondent's claims, competent police officers could disagree whether the force used was reasonable under the circumstances.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court held "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The doctrine of qualified immunity, the Court wrote, is necessary to balance competing polices:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Id. at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

In *Anderson*, this Court held objective good faith on the part of police officers in making determinations of probable cause and exigent circumstances gives rise to qualified immunity. 483 U.S. at 640. In its opinion, the Court expressed the principle of objective good faith in the following terms:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. *See, e.g. Malley* [*v. Briggs*, 475 U.S. 335, 341 (1986)]. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id; *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity helps ensure police officers will not "err always on the side of caution because they fear being sued").

In *Malley*, 475 U.S. at 341, *cited in Anderson*, 483 U.S. at 640, the Court had made it clear that objective good faith will bar a claim for damages against a police officer unless the conduct is obviously unlawful, holding officers "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but *if officers of reasonable competence could disagree on this issue, immunity should be recognized*." (Emphasis added).

Under this Court's cases, qualified immunity extends to a Fourth Amendment claim unless there is no room for disagreement among reasonable police officers regarding the legality of the conduct at issue. This formulation is echoed in the opinions of many lower courts. *Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1999), for example, held that objective good faith is met, and a police officer is entitled to qualified

immunity, if officers of reasonable competence could disagree on the legality of the officer's actions. Similarly, in *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691 (1st Cir. 1994), the court noted:

> [W]hether substantive liability or qualified immunity is at issue, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.

42 F.3d at 695 (footnote omitted, citing *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203 (1st Cir. 1990), *cert. denied*, 500 U.S. 956, 111 S. Ct. 2266, 114 L. Ed. 2d 718 (1991); *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir.), *cert. denied*, 510 U.S. 946, 114 S. Ct. 386, 126 L. Ed. 2d 335 (1993); *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987)). *See also Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996) (reasonableness must not be addressed with "20/20" hindsight); *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997) (qualified immunity appropriate unless circumstances would inevitably lead a reasonable officer in the defendant's position to conclude that force used was unlawful), *cert. denied*, 525 U.S. 870 (1998).

Summary judgment of course requires the evidence to be examined in the light most favorable to respondent's

claims. Nonetheless, summary judgment should have been granted unless the evidence supporting respondent's claims affirmatively showed the force used was objectively unreasonable. If reasonably competent police officers could disagree about whether the alleged use of force was justified, petitioner was entitled to qualified immunity. *Malley.*

II. AS A MATTER OF FOURTH AMENDMENT LAW, A SUBSTANTIAL NUMBER OF LOWER COURTS WOULD HOLD THAT USE OF MINIMAL FORCE TO MAKE AN OTHERWISE LAWFUL ARREST AND RESULTS IN NO INJURY DOES NOT VIOLATE THE CONSTITUTION; THEREFORE, A REASONABLE POLICE OFFICER COULD HAVE CONCLUDED PETITIONER'S CONDUCT WAS LAWFUL.

A. The Ninth Circuit's analysis of the underlying Fourth Amendment violation failed to consider important and relevant factors and failed to consider the circumstances from the perspective of petitioner.

In analyzing the force used to arrest respondent, the opinion below considers only three factors: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect actively resists detention or attempts to escape." 194 F.3d at 970. The opinion itself earlier acknowledges this list, drawn from *Graham v. Connor*, 490 U.S. at 396, is "non-exhaustive." *Id.* at 967. Having thus narrowed its perspective, the opinion compounds the error by freely substituting the court's perceptions of the circumstances surrounding respondent's arrest for those of petitioner:

> Taking these facts as true for the purpose of summary judgment, no reasonable officer could have believed that the alleged amount of force used to arrest Katz was necessary under the circumstances. Unfurling a banner at a public event does not appear to be a particularly severe crime. Katz was sixty years old and wearing a leg brace. There is no indication that he was armed or dangerous. From all that appears at this stage of the case, he did not pose an immediate threat to the safety of the officers or anyone else. Although Saucier disputes whether Katz resisted arrest, Katz says he did not.

194 F.3d at 970 (citation omitted).

Nowhere does the opinion consider the circumstances surrounding respondent's arrest from the perspective of petitioner, who had been reasonably instructed to diffuse any situation quickly and with a minimum of attention, and who had no way of knowing whether other demonstrators were present and might create a disturbance at the arrest of respondent. Nowhere does the opinion take into consideration the fact that the force used allowed petitioner to take decisive control of an arrest situation and resulted in no physical injury to respondent. Petitioner conducted a lawful arrest by reasonable and effective means and should not be hailed into federal court for his actions.

As a matter of substantive Fourth Amendment analysis, the opinion below fails to adequately address the "totality of circumstances" of this case. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Its restrictive analysis also fails to adequately balance "the nature and quality of the intrusion

on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. at 8.).

Additionally, the opinion's authoritative statements regarding the reasonableness of force failed to allow "for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.*, 490 U.S. at 397. *See also Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) ("[U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.").

The result is disturbing. It goes too far towards making "every push or shove," if it later is made to seem "unnecessary in the peace of a judge's chambers" into a constitutional violation for which there is no qualified immunity. *Johnson v. Glick*, 481 F.2d at 1033, *quoted in Graham*, 490 U.S. at 397. If police officers hesitate to handle an arrest situation decisively out of fear of facing litigation, even when their conduct is reasonably related to legitimate law enforcement goals and causes no harm, they ultimately undermine their own effectiveness and may endanger themselves, their colleagues, and the public at large. These are precisely the dangers that the qualified immunity doctrine, *see Malley*; *Hunter,* and the limitations on excessive-force liability, *see Graham*, are meant to prevent.

B. The opinion below fails to consider factors considered relevant in a Fourth Amendment context by a substantial number of lower courts.

A substantial number of lower courts have concluded that instances of minimal force that do not result in actual or significant injury do not state a Fourth Amendment excessive force violation. In *Foster v. Metropolitan Airport Comm'n*, 914 F.2d 1076 (8th Cir. 1990), the Eighth Circuit held that the officers' use of force after they successfully pulled the plaintiff from the car did not to give rise to a constitutional claim of excessive force under the fourth amendment, even though the plaintiff testified that he was pushed against a wall twice on the way to the holding area, given his further testimony that he sustained no injury as a result of being pushed. Similarly, in *Randles v. Gregart*, 965 F.2d 90 (6th Cir. 1992), the Sixth Circuit held that the modest force exerted, which resulted in no injury, was objectively reasonable. In that case plaintiff had refused to give deputies his gun, which he was using to hunt illegally on his property.

Lack of injury may be an important fact even when deadly force is threatened. In *Sharrar v. Felsing*, 128 F.3d 810, 821 (3d Cir. 1997), police officers required the arrestees to lie face down in the dirt, with guns to their head, and made threats. The Court held that even though these actions caused discomfort and humiliation, they were still objectively reasonable. *Id. See also Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996) (in due process case, proper for jury to

consider extent of injury, need to apply force, relationship between force used and need for force, threat reasonably perceived by official, and efforts made to temper severity of a forceful response); *Lester v. Chicago*, 830 F.2d 706, 714 (7th Cir. 1987) (pre-Graham case holding that plaintiff stated trial-worthy Fourth Amendment "excessive force" claim when, during course of arrest for disturbing peace, plaintiff was kneed in the back, threatened with being struck, dragged down a hallway, and handcuffed tightly, causing bruises on her wrists); *Azeem v. Town of Bethel*, 2000 WL 1838329 (D. Conn., Sept. 27, 2000) (recognizing the importance of some injury to arrestee in an excessive force case).

While most courts recognize the relevance of the amount of force used and degree of injury, the Eleventh Circuit has adopted a *per se* rule that application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment. *See Nolan v. Isbell*, 207 F.3d 1253 (11th Cir. 2000).

The Fifth Circuit requires a plaintiff asserting an excessive force claim to have "suffered at least some form of injury," *Jackson v. R.E. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993), even though that court acknowledges its "significant injury" standard was abrogated by *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), an Eighth Amendment case. "[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

Katz cites to an Eleventh Circuit case, *Sheth v. Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998) for support. *See* 194 F.3d at 970. However, in *Sheth* the decision to arrest

itself was unlawful and the court found a triable claim under the following record:

> Officer Webster became enraged and violent. He shoved the plaintiff, who stumbled. He pushed again. The plaintiff cried to Webster that he was hurting her. He threw her back again. According to one witness, he kneed the plaintiff in the stomach. Sheth fell back against a Coke machine, five to twelve feet from where she stood. Webster grabbed Sheth's arm and squeezed it. People around began to shout at Webster to stop, that he was hurting her. At least one witness told Webster that the plaintiff was sick. He twisted her arm around her back and locked handcuffs on her left wrist. Webster then dragged the plaintiff by the arm to his car. She "begged Officer Webster not to arrest her and place her in the car." She told him that she was claustrophobic and taking medication for an illness. Apparently, this was of no avail. . . .

145 F.3d at 1234.

Both *Sheth* and *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 353 (1st Cir. 1995), *cited by Katz*, 194 F.3d at 970, involved an illegal arrest. In *Alexis*, the decision to arrest the plaintiff itself exposed the officer to liability under 42 U.S.C. § 1981, and the court found a triable issue of excessive force based on the following record:

> Leporati suddenly and violently grabbed and pulled [plaintiff] bodily from the booth and across the table, handcuffed her hands tightly behind her

> back, and, with the help of Officer Fuer, dragged her from the booth, bruising her legs in the process. Insisting that she was "not resisting arrest," Alexis asked the officers to allow her to walk out. Instead, they hoisted her by her elbows and carried her from the restaurant to the police car, where Leporati pushed her into the car with the instruction, "Get your ass in there."

67 F.3d at 346.

This case is like neither *Sheth* nor *Alexis*. Here petitioner was conducting an arrest supported by probable cause, his conduct was reasonably related to the legitimate goal of minimizing disruption to a public event, and he did not act with clearly unnecessary violence.

C. Minimal use of force that is reasonably related to the legitimate purpose of making a lawful arrest and results in no physical injury should seldom, if ever, result in a Fourth Amendment violation.

The Fourth Amendment inquiry into whether a police officer used unreasonable force to effect an arrest or seizure necessarily involves considerations that overlap with the Eighth Amendment inquiry into whether "force was applied in a good faith effort to maintain or restore [prison] discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d at 1033). In both situations, government officials are authorized and often called upon to employ force: in the Fourth Amendment context, to make an arrest or seizure; in the Eighth, to administer a constitutionally acceptable regimen

of punishment. In both instances, moreover, the existence of actual or significant physical injury is often highly relevant to the question of " 'whether the use of force could plausibly have been thought necessary' in a particular situation." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (quoting *Whitely*, 475 U.S. at 321).

The continued relevance of the existence of injury to Fourth Amendment excessive force cases, and the reliance of many courts on this Court's Eighth Amendment opinion in *Hudson,* thus comes as no surprise. Historically, the law of excessive force, as expressed both in the opinions of this Court and the lower courts, has drawn consistently from *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973), which listed the extent of injury as one of its factors.[2] As noted in *Graham*, the

> vast majority of lower federal courts [had] applied [*Johnson v. Glick's*] four-part "substantive due process" test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.

490 U.S. at 393.

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2. The four factors are: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

While *Graham* rejected *Johnson v. Glick*'s focus on the intent of the officer as inappropriate to a Fourth Amendment analysis, and adopted a totality of the circumstances test instead, there is nothing in *Graham* suggesting that the remaining three factors are not relevant and important considerations in judging the ultimate question of objective reasonableness. Indeed, the relevance of injury to the issue of excessive force is at least implicit in the Court's statement that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 490 U.S. at 396.

A set amount of physical harm may not be required *per se* to state a Fourth Amendment violation any more than an Eighth Amendment violation. *See Hudson*, 503 U.S. at 7 (The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it"). However, when, as here, minimal force is used simply to make an otherwise lawful arrest, and this force results in no physical injury, a conclusion that excessive force was used should seldom, if ever, follow. *Cf. Hudson*, 503 U.S. at 9-10 ("The Eighth Amendment's prohibition of "cruel and unusual punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.' " (citation omitted)).

D. At a minimum, the cases holding that no Fourth Amendment violation arises from minimal force that causes no physical injury imply that reasonable minds could differ regarding whether the force used by petitioner was unreasonable, and the court below erred in denying summary judgment on qualified immunity.

This Court has yet to speak definitively on the application of *Hudson* in a Fourth Amendment context. *Amicus* respectfully submits that the existence of some actual injury and the use of more than minimal force are equally important considerations in an arrest situation as in a prison case. From the perspective of police officers, it is critical that they be allowed to preserve the ability to act decisively and take control of an arrest situation using at least the level of force present in this case without having to fear civil liability, especially when their conduct results in no physical harm. It is respectfully submitted that in the long run a rule that preserves this ability best serves the public interest without unduly intruding upon individual interests protected by the Fourth Amendment.

However, even were the Court ultimately to disagree and hold the substantive law on this issue is other than the cases cited above suppose, for now it is clear that reasonably competent police officers could differ on the issue. "If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). At the time of respondent's arrest it cannot be said that a reasonably competent police officer would have concluded that petitioner's use of force was clearly excessive. The opinion below errs in reaching the opposite conclusion.

CONCLUSION

Qualified immunity serves the critically important function for law enforcement of allowing officers to act in reasonable good faith without having to worry that courts latter will dissect decisions made in the pressures and uncertainties of the moment and conclude that there was a better course of action than the one chosen. A police officer's effective and safe discharge of his or her duties often depends on the ability to take reasonable steps to exert control of an arrest situation "with independence and without fear of consequences." *Harlow*, 457 U.S. at 819.

The opinion below undermines the doctrine of qualified immunity by holding petitioner acted in an objectively unreasonable fashion when he used minimal force to make an arrest that caused no physical harm to respondent. This transforms the broad limits of objective good faith contemplated by the qualified immunity doctrine into a straightjacket on police decisions, and the Fourth Amendment's prohibitions against excessive force into a prohibition on the use of force at all in many situations. *Amicus* respectfully submits the opinion below is wrongly decided, and the Court should reverse.

Respectfully submitted,

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